Dissenting Views to Accompany H.R. 4772,
the "Private Property Rights Protection Act of 2005"

We respectfully dissent from the favorable reporting of H.R. 4772, the "Private Property Rights Protection Act of 2005." This legislation will narrow the judicial doctrine of ripeness[1] and significantly pare back the abstention doctrine[2] for land owners asserting so-called regulatory takings claims against state and local governments in federal courts. Supporters of H.R. 4772 argue that the legislation would allow greater and fairer access to federal courts by those who have federal property rights claims under the Fifth Amendment's Taking Clause.[3] However, H.R. 4772 appears to do little more than permit landowners to forum shop between state and federal courts when they pursue takings claims against the government. In addition, this bill would make significant changes to takings law as established by Supreme Court precedent.[4]

Overview

H.R. 4772 deals with regulatory takings – takings in which the government subjects property to regulations but does not change its ownership – such as zoning ordinances. H.R. 4772 would force premature federal involvement in local land use disputes and tells the states and municipalities that they are not competent to adjudicate their land disputes. This legislation would also benefit just one set of plaintiffs – real property owners alleging Fifth Amendment takings – to the exclusion of other persons who face abrogation of their constitutional rights and who must first bring their claims in state court. Furthermore, evidence suggests that state courts

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[1]Ripeness is a judicial doctrine, partly rooted in Article III of the United States Constitution's "cases" and "controversies" requirement, which seeks to ensure that a matter is sufficiently mature for resolution.

[2]Abstention is a discretionary doctrine under which a federal court may decline to decide cases that are otherwise properly before the court. The abstention doctrine is based on the notion that federal courts should not intrude on sensitive state political and judicial controversies unless it is necessary.

[3]See Letter from Joseph M. Stanton, Chief Lobbyist, National Association of Homebuilders to Members of the United States House of Representatives (March 1, 2006).

[4]H.R. 4772, as well as its predecessors, was introduced in response to the United States Supreme Court's decision in *Williamson County v. Hamilton Bank* (473 U.S. 186) (1985). The Court's decision in Williamson County established that a takings plaintiff was barred from filing suit in federal court absent a definitive final decision by the local land use authorities and if plaintiff had failed to pursue available state procedures for obtaining compensation. Most recently, in *San Remo Hotel v. City and County of San Francisco* (545 U.S. 323) (2005). The Supreme Court confirmed and did not modify prior case law that held that once a property owner tries their case in state court, and loses, the doctrine of collateral estoppel bars the owner from re-litigating takings issues previously resolved by the state court. Furthermore, Subsection 2 of Section 5 overrides the parcel as a whole rule as upheld by the Supreme Court in 2002 in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (535 U.S. 302).

quickly and fairly resolve most takings cases so legislation like H.R. 4772 is unnecessary. Most significantly, H.R. 4772 may be unconstitutional as it would make cases prematurely – and unconstitutionally – "ripe" for review, even if the claimant had not pursued available state remedies. Since such actions may not meet the constitutional standard of "finality," such claims would be dismissed by the courts.

H.R. 4772 revives – with some significant additions – a set of legislative proposals that have been pending in Congress for almost a decade. Most of the provisions of H.R. 4772 first appeared in the 105th Congress as H.R. 1534, which passed the House by a mostly party line vote of 248 to 178, and as a portion of S. 2271, and which died on the Senate floor on a 52 to 42 cloture vote. In the 106th Congress, the House passed a similar bill, H.R. 2372, by a vote of 226 to 182, but the proposal died in the Senate. Prior to this year, most observers had believed that this failed legislative effort had run its course.

This so-called "procedural approach" to the takings issue was launched in the 105th Congress in response to the widely perceived extremism of the takings provision in the Contract with America in the 104th Congress. The Contract with America proposal would have inserted into federal law a new statutory standard for takings liability that went far beyond the standard for takings liability under the Takings Clause of the Fifth Amendment to the U.S. Constitution. This proposal passed the House, again, on a mostly party line vote, but generated widespread opposition and eventually died in the U.S. Senate. The procedural approach to takings in H.R. 1534 was presented as an alternative, less extreme approach to takings. It also reflected the emerging role in the takings debate of the developer lobby, which is primarily interested in using the threat of takings litigation as leverage in land use negotiations.

While HR 4772 includes many of the procedural elements of H.R. 2372 (and the earlier H.R. 1534), it also is designed to revive the controversial, discredited approach of altering the constitutional standard for takings liability. Indeed, in some ways HR 4772's approach to modifying constitutional standards is more extreme than the approach in the Contract with America. This bill would establish new standards of liability that would alter the constitutional standards under both the Takings Clause and the Due Process Clause. Unlike the Contract with America proposal, which primarily focused on altering the standard of liability applicable to the federal government, H.R. 4772 would establish new standards of liability exclusively applicable to state and local governments. In this sense, H.R. 4772 is a far greater assault on federalism that any prior takings proposal in Congress.

Many groups join us in concluding that H.R. 4772 is not sound policy. These groups include the American Planning Association, the Community Rights Counsel, American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Friends of the Earth, National Audubon Society, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, the Wilderness Society, U.S. Public Interest Research Group, the United States Conference of Mayors, the National Center for State Courts, the National League of Cities, the National

Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association.[5]

The United States Conference of Mayors "support[s] the longstanding requirement that claimants under the Takings Clause of the U.S. Constitution pursue available State compensation procedures before filing a federal Takings claim in Federal court."[6] The Conference of Chief Justices and the National Center for State Courts note that there is "no record that state courts generally fail to render fair decisions in land use cases."[7] Notably, the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association believe that "the bill raises very serious constitutional questions. The Supreme Court has repeatedly stated that a takings claimant suffers no constitutional injury unless a state court has denied a claim for just compensation."[8]

Concerns With Legislation

I. H.R. 4772 Encourages Federal Interference in Local Matters

H.R. 4772 would undermine local zoning and land use authority by giving large land developers and special interests a "club" with which to intimidate communities that cannot afford to put up a fight in federal court. In addition, by permitting takings plaintiffs to bring their cases in federal court prematurely, it would burden localities with higher legal fees – again discouraging independent decision-making at the local level at the risk of engaging in a

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[5]See Letters from the American Planning Association, the Community Rights Counsel, American Rivers, Clean Water Action, Defenders of Wildlife, Earthjustice, Friends of the Earth, National Audubon Society, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, the Wilderness Society, U.S. Public Interest Research Group, the United States Conference of Mayors, the National Center for State Courts, the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association to Members of Congress (109th Congress) (on file with the House Committee on the Judiciary).

[6]Letter from the United States Conference of Mayors to the Honorable Arlen Specter, Senate Judiciary Chairman, and the Honorable Patrick Leahy, Senate Judiciary Ranking Member (June 6, 2006).

[7]Letter from Randall T. Shepard, Supreme Court of Indiana Chief Justice and Conference of Chief Justices President, to the Honorable James Sensenbrenner, Jr. House Judiciary Chairman, and the Honorable John Conyers, Jr., House Judiciary Ranking Member.

[8]Letter from the National League of Cities, the National Association of Counties, the National Conference of State Legislatures, the Council of State Governments and the International City Management Association to the Honorable Steve Chabot, House Judiciary Constitution Subcommittee Chairman, and the Honorable Jerrold Nadler, House Judiciary Constitution Subcommittee Ranking Member (June 8, 2006).

protracted federal court fight. The costs of defending unjustified federal takings litigation would threaten local community fire, police, and environmental protection services.

For example, a developer may apply for a permit to build 800 homes on a parcel of land. A zoning official may deny that request, and a zoning board may as well. Without any determination of what would be a permissible use of that land short of the denied use, the case could be brought before a federal district court. Currently, such an issue might be deferred, dismissed or stayed while a state administrative agency or court concludes consideration of the claim. H.R. 4772 gives claimants a "fast track" to the federal courts, potentially burdening both the federal judiciary and the land use procedures of states and localities.

H.R. 4772 would also minimize the local citizens' ability to effectively participate in the land use process. At the administrative level, neighbors can participate without hiring a lawyer. Neighboring property owners and citizen groups sometimes do not find out about harmful land use proposals until the later stages of local processes – the very stages that the bill would allow developers to bypass. The bill would eliminate the most convenient and inexpensive forums for neighbors, who may be concerned about a proposal's impact on their property, health, safety, community, and environment. We need to ask ourselves whether we really want to make it more difficult for our local governments to protect their citizens against groundwater contamination or to prevent a corporation from operating a waste dump? Do we really want to limit the ability of our local governments to regulate adult bookstores? Yet this is precisely the effect H.R. 4772 will have by prematurely allowing takings claims to be brought into federal court.

II. H.R. 4772 Encourages Forum Shopping and Creates and Undue Burden on Federal Courts

H.R. 4772 increases a plaintiff's ability to forum shop. Under the regime of H.R. 4772, developers would be given greater flexibility to choose to file suit in federal court when that forum appears to be more favorable to them in a particular jurisdiction, or to file suit in state court when the state forum is perceived to be more favorable. To the extent that courts apply the constitutional takings standard in a slightly different manner, we should not encourage parties to take unfair advantage of such variations among jurisdictions.

The changes wrought by H.R. 4772 are likely to result in a significant increase in the federal judicial workload. In 1997, with respect to an earlier version of this legislation, the Congressional Research Service (CRS) has found "there is a sound argument that H.R. 1534 will result in a significant increase in the workload of the federal courts, particularly from takings litigation."[9] When this legislation was first taken up in the 105th and 106th Congresses, the Judicial Conference of the United States commented, "this legislation could sweep large numbers of takings claims into the federal courts. Such an increase in case filings, especially if brought

[9]Robert Meltz, *CRS Report for Congress, "Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534*, September 22, 1997 (97-877A).

prematurely, could raise workload impact concerns and contribute to existing backlogs in some judicial districts."[10]

Another problem is that the legislation's limitation on the abstention doctrine raises problems where the States do not have formal certification procedures. The bill creates a procedure whereby federal courts certify "significant but unsettled" questions of state law to the highest appellate court of the State. But not all States have adopted such procedures. Thus, the bill may block the federal courts from abstaining and could force them to decide the State law question themselves.

Ultimately, H.R. 4772 creates a scheme completely at odds with federalist principles: the massive transfer of power over local land use decisions to the federal judiciary.

III. H.R. 4772 Is Unnecessary

Advocates of the bill allege that takings claims get bottled up for years in expensive and time-consuming litigation. In fact, there is no reliable evidence that this occurs with any statistical frequency.[11] California Deputy Attorney General Daniel Siegel finds, "[w]hen compared to the many thousands of land use decisions made every year by the nation's 35,000 cities and towns, however, and the typical length of time that the judicial process requires, the stories of extreme delay are isolated."[12] Although the National Association of Home Builders ("NAHB") has stated that it takes an average of 9.6 years to resolve takings disputes, the facts do not support this contention. NAHB arrived at this statistic by using only 14 federal appellate court cases over a nine-year period (1990-1998).[13] In view of the hundreds of land use matters handled by local governments every day, this tiny statistical sample – fewer than two cases per year – is meaningless. By ignoring the countless land use disputes that are resolved in the local planning process without litigation, as well as the hundreds of takings cases litigated in state court each year (the bulk of the lawsuits), the NAHB's selective sampling biased the results of its survey.[14] Moreover, if the NAHB's argument concerning federal court delays has merit, it would see to militate against this bill which would place these cases into federal system. For all the complaints about the state courts, the NAHB study does not address that system at all.

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[10]Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States, to Rep. Henry J. Hyde, Chairman, Committee on the Judiciary, Feb. 14, 2000, at 3.

[11]*See Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution,* 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General).

[12]*Id*.

[13]Community Rights Counsel, Talking Points, *The False and Misleading Statistics Behind the NAHB Takings Bill, available at* http://www.communityrights.org/PromotesSmartGrowth/NAHB/talkingpoints.asp.

[14]*Id.*

Supporters also allege that federal courts are hostile to property rights because they dismiss 83% of takings cases without reaching the merits.[15] This statistic, too, is misleading. In the vast majority of the cases surveyed (29 of 33 cases), the federal court dismissed the takings case because the claimant's lawyer refused to follow state procedures for seeking compensation before suing in federal court.[16] The Supreme Court repeatedly has ruled that the Constitution requires takings claimants to follow state compensation procedures first.[17] Federal courts hardly can be faulted for applying this straightforward and binding rule. It is therefore disingenuous to suggest that these cases demonstrate hostility to property rights by federal courts or local governments. This statistic merely shows that a few takings claimants (33 over a nine-year period) tend to lose when their attorneys ignore the rules that apply to everyone.

IV. H.R. 4772 Departs From Traditional Constitutional Interpretation and Significantly Changes Takings Law

H.R. 4772 contains provisions that were not found in the 105th and 106th's versions of this bill. These new provisions are found in Section 5 and give additional cause for concern.

Subsection 1 of Section 5 addresses conditions or exactions imposed on developers in conjunction with the grant of development authorizations. It does so in a highly ambiguous and confusing fashion. The language appears to be circular in the sense that it states that localities shall be liable under section 1983 if conditions or exactions are unconstitutional.

The bill broadens the terms "condition" or "exaction" by adding "whether legislative or adjudicatory in nature, including but not limited to the payment of a monetary fee or a dedication of real property from the injured party." Although the Constitution appears to supply the governing standard for the purpose of this provision, this language can be read as at least attempting to encourage the view that all kinds of conditions and exactions may be subject to the same heightened constitutional scrutiny regardless of whether they are legislative or adjudicatory in nature, and regardless of whether they involve the payment of money or dedication of real property.

The U.S. Supreme Court has said that a heightened standard of review, including specifically the so-called "essential nexus," or Nollan test,[18] and the "rough proportionality," or Dolan test[19], apply to certain exactions, in particular those involving dedications of entitlements to physically occupy private property imposed through adjudicatory procedures.

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[15] *Id.*

[16] *Id.*

[17] *See City of Monterey v. Del Monte Dunes*, 526 US 687, 710 (takings claimants "suffer no constitutional injury" until the state court denies compensation).

[18] *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987).

[19] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Supreme Court has not said that the rule applicable to exactions applies to any and all sorts of conditions. In particular, it is very doubtful under current precedent whether these demanding tests apply to conditions requiring payment of money or exactions imposed through general legislation. Virtually all courts that have addressed the issue have concluded that financial exactions imposed through legislative measures are *not* subject to these demanding tests.[20] To the extent this subsection is designed to promote the opposite viewpoint, it departs from the established reading of the Constitution.

Subsection 2 of Section 5 would override the so-called "parcel as a whole" rule, a proposition the Supreme Court has repeatedly reaffirmed by finding that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[21] Instead, the Court focuses "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[22] There has long been a debate about whether regulatory takings claims should be evaluated by focusing on the restricted portion of a property or an owner's entire contiguous ownership. The Supreme Court effectively resolved this debate in favor of the parcel as a whole rule in the 2002 decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[23] Many courts have recognized that the parcel as a whole rule applies regardless of whether the property is divided into separate tax lots or is otherwise divided up for other purposes.[24]

In overriding the established application of the parcel as a whole rule, Subsection 2 of Section 5 would allow a developer to divide up the lot in order to have a small section considered independently for takings purposes. For example, if a developer owned property, 99% of which was suitable for development, and 1% of which consisted exclusively of wetlands, the bill would allow the developer to divide that 1% into an independent parcel and claim a 100% loss that would be potentially compensable. The new rule would thus allow a developer to game the system and force taxpayers to pay "compensation" for the developer's ability to build on 99% of

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[20]*See, e.g., Rogers Machinery v. Washington County,* 45 P.3d 966 (Or.App. 2002).

[21]*Penn Central Transp. Co. v. New York City, 438 U.S. 104,131 - 133(1978)*; *See Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution*, 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General). At the hearing, Daniel Siegel stated, "the bill seeks to modify the existing "parcel as a whole" rule under which the courts analyze the owner's entire property interests, rather than the particular portion of the property that is regulated, to determine whether the impact of the regulation on a parcel is "so onerous" as to amount to a taking."

[22]*Id.*

[23]535 U.S. 302 (2002).

[24]*See e.g. Broadwater Farms Joint Venture v. United States*, 232 F.3d 908 (Fed. Cir. 2000); *District Intown Properties Ltd. v. District of Columbia,* 198 F. 3d 874 (D.C. 1999).

his land. The Constitution has never guaranteed the ability to build on every square inch of property regardless of the harm it would cause neighboring landowners and the community at large. This radical change in the parcel as a whole rule which would give developers a limitless ability to game the system and defraud taxpayers.

Faced with an attempt by a plaintiff to divide a property in the manner permitted by this legislation, the Idaho Supreme Court had this to say:

> We cannot say, however, that the transfer and fact of separate ownership by themselves necessarily end the inquiry. Indeed, the City has questioned the purpose of the transfer and we believe the circumstances of the transfer may be entirely relevant to the denominator inquiry. To explain: a rule that separate ownership is always conclusive against the government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis. It is not pure fantasy to imagine a scenario wherein halfway through a takings suit, Landowner agrees with Company to transfer a parcel of Beachacre-which appears, as the waterward parcel does here, to be separate from Landowner's other parcel-with a wink-and-a-nod agreement to transfer back after the suit or to jointly manage, use, and develop the property. As the Court of Claims explained in *Ciampitti*, supra, the purpose of the denominator inquiry is to define the property as realistically and fairly as possible in light of the factual circumstances. We cannot endorse a rule that turns a blind eye to all the relevant factual circumstances, including the purpose, character and timing of any transfer, especially one made during the course of a takings case.[25]

Finally, subsection 3 of Section 5 would provide that, in the case of alleged deprivations of property rights or privileges, a substantive Due Process claim should be evaluated based on "whether [the government action] is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." The provision is apparently designed to overturn the widely accepted view that substantive due process claims should be evaluated under a "shocks the conscience" standard.[26] Deputy Attorney General Siegel testified, "[u]nder that standard [the "shocks the conscience" standard], it is "insufficient" to allege that local government "arbitrarily applied" a land use restriction."[27]

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[25] *City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 320 (2006)(citations omitted).

[26] *See, e.g., United Artists Theatre Circuit v. Township of Warrington*, 316 F. 3d 392 (3rd Cir. 2003) (Alito, J.); *See also Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution*, 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General).

[27] *Hearing on H.R. 4772, the "Private Property Rights Implementation Act of 2005" Before the House Committee on the Judiciary, Subcommittee on the Constitution,* 109th Congress (June 8, 2006) (testimony of Daniel Siegel, California Deputy Attorney General).

V. H.R. 4772 Is Likely Unconstitutional

In its 1985, 7-1[28] opinion in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* the Supreme Court held that a takings claim is not ripe for federal court review if: (1) the property owner had not obtained a "final decision" from the appellate administrative agency, and (2) the property owner had not first filed the claim in state court to challenge the government action.[29] Importantly, the Court held that these requirements inhere in the nature of the Takings Clause of the Constitution. The Court found that the plaintiff needed to avail itself of the state's and locality's procedures in order to evaluate essential components of the takings claim – the economic impact of the regulation and whether the claimant was denied just compensation.[30] This rule is "compelled by the very nature of the inquiry required by the Just Compensation [Takings] Clause" because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final definitive position regarding how it will apply the regulations at issue to the particular land in question." This Supreme Court authority indicates that H.R. 4772 unconstitutionally attempts to circumvent these constitutionally mandated ripeness requirements through a statutory mechanism. [31]

Significantly, the Supreme Court reaffirmed this principle in 1999. In 1999, in *Del Monte Dunes*, the Court stated, "A federal court ... cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate post deprivation remedy. Even the State of California, where this suit arose, now provides a facially adequate procedure for obtaining just compensation for temporary takings such as this one."[32] H.R. 4772 would therefore appear to make cases prematurely – and unconstitutionally – "ripe" for review, even if the claimant had not pursued available State remedies.

VI. H.R. 4772 Elevates Property Rights Over Other Constitutional Rights

H.R. 4772 elevates property rights over other constitutional rights by giving claimants with takings claims expedited access to the federal courts, while leaving in place requirements that plaintiffs with other constitutional claims exhaust state court procedures before filing a case in federal court. This turns the very purpose of Section 1983 actions completely on its head by making property rights the civil right most explicitly and prominently protected by Section 1983. Section 1983 was adopted as part of the Civil Rights Act of 1871 and was specifically designed to

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[28]Justice Powell took no part in the decision.

[29]473 U.S. at 186.

[30]*Id.* at 191-95.

[31]*Williamson*, 473 U.S. at 190-91; *see also MacDonald*, 477 U.S. at 350 ("Whether the inquiry asks if a regulation has 'gone too far,' or whether it seeks to determine if proffered compensation is 'just,' no answer is possible until a court knows what use, if any, may be made of the affected property.").

[32] 526 U.S. at 721.

halt a wave of lynchings of African Americans that had occurred under guise of state and local law.

In numerous instances, courts have stated that prior to filing a constitutional claim under 42 U.S.C. § 1983 in federal court, the plaintiff must first pursue state court remedies. The CRS finds that Federal courts invoke the abstention doctrine against many Section 1983 claims – not just those Section 1983 claims that involve takings of property.[33] This has occurred, for example, in cases involving constitutional challenges to the termination of parental rights,[34] detention in violation of the 6th Amendment right to counsel,[35] confinement for juvenile offenders in violation of the 8th Amendment,[36] denial of Medicaid benefits in violation of 1st Amendment religious protections,[37] gender discrimination,[38] and many others.[39] If we are going to give property owners the ability to "jump the line" into federal court, it seems only fair that we should extend this same right to other Section 1983 plaintiffs.

Conclusion

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[33]CRS stated specifically, "[a]bstention is indeed invoked by federal courts to dismiss or stay non-real-property-related section 1983 claims." Robert Meltz, CRS Memorandum, *"Property Rights" Bills Take a Process Approach: H.R. 992 and H.R. 1534*, (September 22, 1997).

[34]*See, e.g., Amerson v. State of Iowa*, 94 F.3d 510 (8th Cir. 1996).

[35]*See, e.g., Mann v. Jett*, 781 F.2d 1448 (9th Cir. 1985). *See also Bullock v. Woodside*, 2000 U.S. App. LEXIS 12814 (9th Cir. 2000) (the abstention doctrine outlined in Mann applies only to criminal prosecutions).

[36]*See, e.g., Manney v. Cabell*, 654 F.2d 1280 (9th Cir. 1990), *cert. denied*, 455 U.S. 1000 (1982). *See also Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984) (abstention in *Manny* was proper because the law which was at issue in the case was "unusual.")

[37]*See, e.g., Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978). *Winters* identified three times when abstention is proper: (1) when the state statute is unclear or the issue of law uncertain; (2) when resolution of a federal issue depends upon the interpretation given to a state law; and (3) when the state law is susceptible to an interpretation that would avoid or modify the constitutional issue. *Id.*

[38]*Tiger Inn v. Edwards* held that abstention is proper for the state court to clarify the state court position on the applicable law. 636 F. Supp. 787 (D.N.J. 1986).

[39]*See, e.g., Allen v. McCurry*, 449 U.S. 90 (1980) (individual required to litigate a Fourth Amendment search and seizure claim in a state criminal proceeding is completely barred from asserting his federal constitutional claim in a subsequent Section 1983 action in federal court); *Heck v. Humphrey*, 512 U.S. 477 (1994) (abstention may be appropriate when there is a parallel state-court criminal proceeding).

In conclusion, H.R. 4772 presents a substantial number of concerns. We believe that H.R. 4772 serves as an assault on the principles of federalism. This legislation encourages forum shopping with no evidence that there is a need for increased access to federal courts for takings claims. Significantly, H.R. 4772 departs from traditional Constitutional interpretation and makes substantive changes in takings law. In fact, this bill could be deemed unconstitutional itself. We also take issue with this bill elevating property rights over the very civil rights 1983 was enacted to protect. It is for these reasons that we must submit dissenting views on H.R. 4772.

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